

9 FAM 41.51 EXHIBIT II

(CT:VISA-771; 10-03-2005)

(Office of Origin: CA/VO/L/R)

EXCERPTS FROM DEPARTMENT OF HOMELAND SECURITY (DHS) ADJUDICATOR'S FIELD MANUAL RELATING TO THE EVALUATION OF CRITERIA PERTAINING TO SPECIALTY OCCUPATIONS

31.3 (G) ADJUDICATIVE ISSUES.

(1) Deciding If the Proposed Employment Is a Specialty Occupation.

Although the definition of specialty occupation is included in the statute itself and the regulations are specific regarding the criteria for determining what qualifies as a specialty occupation, approval or denial often comes down to a judgment call by the adjudicating officer. There are numerous references available (such as the Department of Labor's (DOL) Occupational Outlook Handbook) to describe specific vocational preparation for various occupations. However, it is important to note that occupations are rapidly evolving and job titles themselves are often meaningless. In order to correctly adjudicate a case, it is necessary to consider all the facts surrounding the petition: the beneficiary's education and work experience, the nature of the petitioner's business, industry practice, and salary (both offered to the beneficiary and typical for the industry). It is important not to be so influenced by a single factor, such as the job title or salary, that other indicators are overlooked.

(2) Equivalency of Experience and Education.

One of the most common situations an adjudicator will encounter is (an application) filed for an alien in a specialty occupation where the alien lacks a U.S. bachelor's degree. Adjudicators should be thoroughly familiar with 8 CFR 214.2(h)(4)(iii)(D) which describes

the kind and amount of experience which can be used to establish the equivalence of a degree. Three years of professional experience may be used to substitute for each year of college-level training. The most critical aspect of this type of adjudication is deciding whether the quality of experience is at high enough level to qualify as "professional." Experience is generally documented through letters from past employers and may be so lacking in specificity as to make the qualitative determination difficult or impossible. The regulations for deciding equivalency are very specific and must be closely followed.

Foreign educational credentials, licenses, and other forms of documentation are easier to evaluate than experience. The petitioner may establish from an authoritative source or from transcripts, certificates, or other such school records that the alien has college-level education. College-level training may have been acquired at a college or university or other academic institution which grants a degree, diploma, or certificate, such as a technical college. It may be useful to compare the beneficiary's age at completion and the duration of the course of study, with the average age of graduates of United States institutions offering similar programs as a factor in determining equivalency of education.

Specialized training may have been acquired through an apprenticeship program, employee-sponsored training courses, vocational training schools, or other commercial training facilities. The starting and ending dates of all training in the field must be shown. Training certificates and an outline or summary of the curriculum should be submitted.

Membership in a professional association, per se, is insufficient evidence of equivalency. An association which grants certification or registration in the profession should have an accrediting body which has standards for the profession, and which issues an official document to applicants verifying that they have been awarded professional credentials in the profession. The standards of the organization should be reviewed to ensure that bachelor's degree or higher, or its equivalent, is required for membership.

In suspect cases, overseas experience can be verified by the overseas Department of Homeland Security (DHS) office (see Chapter 10.5(d) on requesting an overseas investigation). Such investigations should not be routinely requested, but can be used when all other avenues have been explored and there is still serious doubt about claimed experience.

(3) Unsolicited Evaluations.

An evaluation by an official who has authority to grant college-level credit at an accredited college or university with training and/or work experience in the profession can also be used to support an

equivalency claim. The Department of Homeland Security's Bureau of U.S. Customs and Immigration Services (USCIS) does not require the alien to be enrolled in a program for college credit at the university in order to accept the evaluation of such an expert. However, the official must be formally involved with the college or university's official program for granting credit based on training and/or experience to have the required authority and expertise to make such evaluations. The evaluation may be done in the official's name as an individual, or as an authorized representative of the college or university. Any such evaluation should be given considerable weight in determining eligibility.

Results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSIS) must be translated into college credits by an authoritative source in the particular program or by an authorized official from an accredited college or university, such as the registrar, in order for the results to be applied towards the degree requirement.

There are a number of outside organizations which evaluate educational credentials to determine degree equivalency. Some organizations may also provide an opinion on the equivalency of experience to education. It is important that the adjudicator distinguish between these two types of evaluations. The latter type of evaluation carries little weight. Although USCIS does not specifically recognize or accredit any sources of evaluations, foreign educational degree evaluations can be of assistance if they are thorough, well documented and specific in reaching an equivalency determination.

(4) Assessing the Needs of the Petitioner for the Services of the Beneficiary.

This issue is occasionally present in (an application) filed by small businesses for aliens with professional skills not normally associated with persons employed in such a business (e.g., a petition for an accountant filed by an auto repair business or restaurant). Often, such petitions are filed by a relative or family friend as an accommodation to the beneficiary. Either the beneficiary will be employed in a lesser capacity or he or she will seek other employment immediately upon arrival. The burden of proof falls on the petitioner to demonstrate the need for such an employee. Unless you are satisfied that a legitimate need exists, such a petition may be denied because the petitioner has failed to demonstrate that the beneficiary will be employed in a qualifying specialty occupation.

(5) Determining the Petitioner's Ability to Pay the Required Wage.

This issue, like the preceding one, is most commonly associated with small enterprises which do not necessarily have the assets required to pay the salary guaranteed in the petition. Such a petition may be an accommodation to a relative or friend who will seek other employment or there may be an agreement to work for lower wages. It is not necessary that complete financial data be submitted with every (application). However, if in the discretion of the adjudicating officer the financial condition of the petitioner is so questionable as to call into question whether the petitioner really intends to employ the alien as claimed, evidence of financial ability may be requested. This is because the financial standing of the petitioner, when taken in consideration with other factors, may be indication that the petition is an accommodation and not a valid job offer. Other factors that may be examined include, but are not limited to, the nature of the petitioner's business, the relationship between the beneficiary and the owners/officers of the petitioning entity, and the petitioner's immigration history.